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No. 89-267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

F. KENNETH CHRISTOPHER,

Petitioner,

v.

MADISON HOTEL CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. WAS THE COURT OF APPEALS' INTERPRETATION OF VIRGINIA LAW ON THE ASSUMPTION OF THE RISK DOCTRINE REASONABLE AND CONSISTENT WITH RULINGS OF THE SUPREME COURT OF VIRGINIA?
2. DID THE COURT OF APPEALS PROPERLY UPHOLD THE TRIAL COURT'S EXCLUSION OF PETITIONER'S EXPERT WITNESS, AN ENGINEER AND PURPORTED HUMAN FACTORS EXPERT, FROM THE TRIAL OF THIS CASE?

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OPINION AND ORDER BELOW

The Opinion rendered in this matter by the Court below dated May 4, 1989 and the Order denying the Petition for Rehearing and Suggestion for Rehearing In Banc dated May 26, 1989 are attached to the Petition Brief as the Appendix.

RULES INVOKED

The pertinent Federal Rules of Evidence provide as follows:

Rule 702. Testimony by Experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to un-

derstand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

This is a simple slip and fall case sounding in negligence. The genesis of this action is Petitioner F. Kenneth Christopher's January 21, 1986 injuries which he sustained while exiting from his guestroom bathtub at the Comfort Inn in Alexandria, Virginia which was operated and managed by the Respondent Madison Hotel Corporation.[1] The Petitioner had finished showering and, before leaving the bathtub, grasped a steel bar to his right which was affixed to the stall. He stepped out of the tub by placing his left foot onto a terrycloth bathmat. He shifted his weight and slipped and fell onto his left knee claiming injuries to both his knee and his back.

[1] The Respondent Madison Hotel Corporation is a privately held Virginia corporation.

Suit was filed in the United States District Court for the Eastern District of Virginia on the basis of diversity jurisdiction.[2] Trial was held in July of 1988. Prior to trial, the Plaintiff named an expert witness, one John G. Kreifeldt, Ph.D., an engineer and purported human factors expert. The Defendant filed a Motion in Limine to exclude the testimony of this expert. The trial court granted the Motion. At the close of the Plaintiff's case, the trial court directed a verdict in favor of the Defendant based on the doctrine of assumption of the risk.

The Plaintiff took an Appeal to the United States Court of Appeals for the Fourth Circuit and, in a decision dated May 4, 1989, the three-judge panel unanimously affirmed the rulings of the trial court. A Petition for Rehearing In Banc was filed but denied by the court on May 26, 1989. The Petition for Writ of Certiorari to this Honorable Court followed pursuant to 28 U.S.C. §1254 (l).

SUMMARY OF ARGUMENT

Petitioner has raised two issues: the propriety of the granting of a directed verdict in favor of the Defendant on the doctrine of the assumption of the risk of injury and the propriety of the ruling excluding the testimony of a purported human factors expert from the trial of this case.

The District Court's rulings and the appellate court's affirmance of those rulings were completely proper. Prior to the slip-and-fall accident experienced by the Petitioner in his hotel bathroom, the condition of the premises was open and obvious to him. He was

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[2] 28 U.S.C. §1332.

familiar with the bathmat which was present in his room because he had used this type of bathmat before at other hotels. He was also aware of the fact that the bathmat lacked rubber backing. He observed the floor on which he placed the bathmat and knew it was slick from its appearance. It was properly held by both the Trial Court and the Court of Appeals that Mr. Christopher's acts in stepping on the bathmat under those circumstances constituted a voluntary assumption of the risk of a known danger thereby barring him from any recovery.

The testimony of Professor John Kreifeldt was properly excluded from the trial of this case for the reason that his testimony would not have assisted the trier of fact in deciding this case and because the prejudicial effect of his testimony would have outweighed any probative value. The condition of the premises where the Petitioner's injury occurred, and the dynamics of the Petitioner's acts in connection with the injury accident, were matters of common knowledge and did not lend themselves to expert testimony of a general nature which would not have focussed on hotel safety in general, or in testing bathroom floors or bathmats in particular. Having no more or less experience in this area than the public in general, Professor Kreifeldt, whose credentials were nevertheless impressive, was properly excluded as an expert witness for the Plaintiff at trial.

Accordingly, the questions which Petitioner raises are ones over which the exercise of this Court's certiorari power is neither appropriate nor necessary.

ARGUMENT
THE WRIT SHOULD BE DENIED

I. The Court of Appeals' Interpretation of Virginia Law on the Assumption of the Risk doctrine was reasonable and was consistent with rulings of the Supreme Court of Virginia

Petitioner contends that the Court of Appeals' interpretation of Virginia law on the issue of assumption of the risk of injury was unreasonable and that it merits review. Respondent disagrees. Under Virginia law, one who voluntarily assumes the risk of a known danger is barred from recovery in a negligence action.[3] The essence of the defense of assumption of the risk is venturousness and a Plaintiff must accept the consequences of such venturousness. In this case, the evidence clearly warranted a finding that the Plaintiff assumed the risk of injury.

The Plaintiff complained that the Defendant created a risk of injury by allowing its patrons to use a terrycloth bathmat on a vinyl tile floor without slip resistant materials in place. This condition, however, as noted by the Court of Appeals, was not a latent condition.[4] Mr. Christopher knew that the bathmat lacked rubber backing and observed that the floor was slick from its appearance but he nevertheless placed the bathmat on the floor. He also testified that he had used this type of bathmat before at other hotels. The Court of Appeals properly held that Mr. Christopher

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[3] *Arrington Adm'r v. Graham Adm'r*, 203 Va. 310, 314, 124 S.E.2d 199, 202 (Va. Court of Appeals 1962).

[4] See *Petition for Writ of Certiorari*, Appendix, p.A8.

voluntarily incurred the risk of any hazard by his own activities.[5]

The test which the appellate court followed in determining the propriety of the directed verdict in favor of the Defendant by the trial court was whether "without weighing evidence or considering the credibility of the witnesses, 'there can be but one conclusion as to the verdict that reasonable jurors could have reached.' "[6] The evidence was so clear on this issue that the court properly held that the Plaintiff assumed the risk of injury and was thereby barred from any recovery.

Petitioner places great emphasis on the case of *Amusement Slides Corporation v. Lehmann*[7] which involved an injury to the plaintiff when he became airborne while riding the "Sky Slide," an oversized amusement park slide ride. The record in that case was replete with evidence of warnings to the plaintiff and knowledge by the plaintiff of certain risks associated with the use of the slide. The issue on appeal, of course, was the plaintiff's assumption of a known risk. While plaintiff knew many of the risks associated with the use of the slide and while the plaintiff voluntarily assumed many of those risks, the risk that caused his injury was not known to him, fully appreciated by him or accepted by him. As stated by the court:

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[5] *Tait v. Rice*, 227 Va. 341, 315 S.E.2d 385, 388 (Va. 1984).

[6] *Gairola v. Comm. of Va. Dept. of General Services*, 753 F.2d 1281, 1285 (4th Cir. 1985), quoting *Wheatley v. Gadden*, 660 F.2d 1024, 1027 (4th Cir. 1981).

[7] *Amusement Slides Corporation v. Lehmann*, 217 Va. 815, 232 S.E.2d 803 (1977).

> It is true plaintiff assumed the risk of injury resulting from a ride down a steep incline at a controlled yet rapid speed. But plaintiff did not assume the hazard of injury due to the negligent failure of the defendant's employee to spread water on the waxed slide when plaintiff began to accelerate to an excessive and dangerous speed.[8]

This hidden risk that was present in the *Amusement Slides* case is absent in Mr. Christopher's case. The Petitioner herein did not expect a slip resistant surface. He was not unfamiliar with the type of mat used nor was he unaware of the shiny floor surface. The condition confronting him was open and obvious and he ventured forth completely aware of his circumstances. In holding that Mr. Christopher assumed the risk of injury, the opinion of the Fourth Circuit Court of Appeals was not inconsistent with the pronouncements of the Virginia Supreme Court in the *Amusement Slides* case.

Petitioner also refers to the case of *Colonial Natural Gas Co. v. Sayers*.[9] The plaintiff-tenant Sayers was injured when, while walking along a footpath at night, he fell into an open ditch containing a gas line. It is true that the Supreme Court of Virginia could not say as a matter of law that Sayers voluntarily assumed the risk of injuring himself in the open ditch because there was evidence that he did not know that there was an open ditch resulting from settlement of

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[8] *Ibid.* at 805.

[9] *Colonial Natural Gas Co. v. Sayers*, 222 Va. 781, 284 S.E.2d 599 (1981).

the ground where the installation had been completed even though he did know that a gas line had been installed several months previously. Once again, there was an unknown element in the *Sayers* case which was not present in this case. Both the *Amusement Slides* case and the *Sayers* case involved additional elements not known to the plaintiff and therefore presumably not considered by the plaintiff before the plaintiff ventured forth. In this case there were simply no "unknowns" to Mr. Christopher. He stepped on a terrycloth bathmat without backing on a shiny vinyl floor after having taken a shower. All of the elements of this scenario were open and obvious to him, known to him and appreciated by him.[10] As stated by the Supreme Court of Virginia in the *Amusement Slides* case, the standard primarily to be applied to the defense of assumption of the risk "is a subjective one, of what the particular plaintiff in fact sees, knows, understands and appreciates."[11] Mr. Christopher's venturousness has barred him from recovery and this Honorable Court should not disturb the rulings of the Court of Appeals in affirming the decision of the trial court.

Moreover, whether the District Court and the Court of Appeals erred in deciding that the Petitioner assumed the risk of injury is a question of state law,

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[10] Petitioner even concedes at page 16 of his Brief that "as a reasonable person [he] was aware of the slight risk of a slip-and-fall injury involved when taking a shower."

[11] *Amusement Slides Corporation v. Lehmann*, 217 Va. 815, 818-19, 232 S.E.2d 803, 805 (1877); *Restatement (Second) of Torts*, §496D, Comment c (1965); see also *McDowall & Wood, Inc. v. Kilby*, 211 Va. 476, 178 S.E.2d 497 (1971); and *Budzinski v. Harris*, 213 Va. 107, 110, 189 S.E.2d 372, 375 (1972).

not appropriate for this Court's review. This Honorable Court has repeatedly stressed that its role is not to review the decisions of Federal Appellate Courts on matters of state law.[12] There is no reason in this case to depart from this traditional rule. This simple slip-and-fall case does not rise to the level of a "special and important" matter warranting this Court's attention.[13]

II. The Court of Appeals properly upheld the Trial Court's exclusion of the Petitioner's expert witness at the trial of this case.

At the trial of this case, the District Court was confronted with a Motion in Limine filed by the defense to exclude the testimony of an engineer and purported human factors expert by the name of John G. Kreifeldt. Although Professor Kreifeldt's curriculum vitae was lengthy, it showed no hotel or motel experience nor any experience in studies surveying bathrooms, bathroom floors, tiling, terrycloth or terrycloth bathmats. There was no human factors' expertise or experience shown in the field of slip-and-falls in general or of the type and kind involved in this case. There was nothing of particular relevance to the facts of this case found in Professor Kreifeldt's background and he would have exhibited no unique experience in areas that the members of the jury would not have already possessed. His anticipated testimony would have included such statements as "the second largest cause of accidental deaths is falls,"

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[12] See for example *Cort v. Ash*, 422 U.S. 66, 72 n.6 (1975); *Pierson v. Ray*, 386 U.S. 547, 558, n.2 (1967); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

[13] See Supreme Court Rule 17.

"145,000 falls on slippery bathroom floors have been reported" and that "a wet condition is a slippery condition." His anticipated testimony, therefore, though offered with the aura of scientific and academic credentials, would not have assisted the jury in deciding the case.

The Court of Appeals properly affirmed the Trial Court in its exclusion of the human factors expert in part because that testimony would not have assisted the jury and also because any probative value of that testimony would have been outweighed by the potential for prejudice. The trial and appellate courts relied upon Federal Rules of Evidence 702 and 403.

Rule 702 provides in part that an expert may be allowed to testify if such testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Testimony as to matters which are obviously within the common knowledge and experience of the jury is made inadmissible under Rule 702 generally because such testimony would not be of any assistance to the jury.[14]

Determinations of whether expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue are properly within the sound discretion of the trial court and will only be overturned for abuse of discretion.[15] Considering the evidence before the Court that the bathroom floor was indeed shiny and with findings at both the trial court and appellate levels that it is common knowl-

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[14] *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1055 (4th Cir. 1986).

[15] *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 323-24 (4th Cir. 1982).

edge that shiny bathroom floors are slippery, it is clear that the exclusion of Professor Kreifeldt's testimony was not error inasmuch as it would not have assisted the jury in understanding a matter so clearly within their own experience and so clearly governed by their common sense.

The second prong of this issue, however, requires a consideration of Rule 403. A Rule 403 determination can be reversed only if a trial judge acted arbitrarily or in an irrational manner.[16] The basis for the trial court's finding that a potential for prejudice existed if the human factors expert were allowed to testify was grounded in the purported expert's lack of any experience regarding hotel safety in general, or in testing bathroom floors and bathmats, in particular. The court of appeals specifically found that the "potential for prejudice arises because the jury could yield their own common sense and experience to his purported expertise."[17] Since the expert had no more or less experience in this area than the public in general, his testimony would have been prejudicial had it been allowed. The court of appeals properly found that the trial court did not act arbitrarily or in an irrational manner but rather in a manner which exhibited a sound exercise of discretion. The analyses under Rules 702 and 403 were proper and Professor Kreifeldt's testimony was properly excluded.

CONCLUSION

It is respectfully urged that the Petition for Writ of Certiorari be denied. The granting of such a Writ

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[16] *United States v. Pehello*, 668 F.2d 789, 790 (4th Cir. 1982).

[17] See Petition for Writ of Certiorari, Appendix, p. A6.

is not a matter of right but rather of judicial discretion and the Petitioner has failed to show special and important reasons for the granting of such a Writ.[18] As Chief Justice Vinson stated in 1949:

> To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.[19]

This case presents no such questions and the questions which have been raised by the Petitioner have had ample consideration at both the trial and appellate levels. Sound judicial discretion would dictate that no further review is in order.

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[18] Supreme Court Rule 17.

[19] Address to the American Bar Association, September 7, 1949, 69 S.Ct. v, vi.